92-395

Supreme Court, U.S.
FILED
AUG 31 1992
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MORTON SCHERL,

Petitioner,

v.

LAWRENCE FISHER, as Trustee, and STEWART KARGE, as Trustee,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether an individual who is a shareholder in a debtor corporation may be denied standing to appeal a bankruptcy court order unless he demonstrates a direct financial interest in the order?

Whether the "person aggrieved" standard encompasses one whose restitution order does not specify restitution to secondary victims.

LIST OF PARTIES

The parties to the proceeding below were the petitioner Morton Scherl and the respondents, Lawrence Fisher as Trustee of the Estate of DuPage Boiler Works, Inc. and Stewart Karge, as Trustee of the DuPage Boiler Works, Inc. Profit-Sharing Plan.

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Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioner Morton Scherl respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled proceeding on June 2, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 965 F.2d 296 and is reprinted in the Appendix at App. 1.

The Memorandum Opinion and Order of the District Court for the Northern District of Illinois (Hart, J.) has not been reported. It is reprinted in the Appendix at App. 7. The Order of the Bankruptcy Court for the Northern District of Illinois (Schmetterer, J.) is unreported. It is reprinted in the Appendix at App. 12.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on June 2, 1992. No petition for rehearing was sought.

Petitioner Scherl invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

11 U.S.C. § 67(c) (1976) (Repealed 1978)

> A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the court upon petition filed within such ten-day period may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. Such petition shall set forth the order complained of and the alleged errors in respect thereto. Unless the person aggrieved shall petition for review of such order within such ten-day period, or any extension thereof, the order of the referee shall become final. Upon application of any party in interest, the execution or enforcement of the order complained of may be suspended by the court upon such terms as will protect the rights of all parties in interest.

11 U.S.C. § 1109(b) (1988)

> (b) A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

18 U.S.C. § 3663(e)(1) (1988)

> The court shall not impose restitution with respect to a loss for which the victim has received or is to receive compensation, except that the court may, in the interest of justice, order restitution to any person who has compensated the victim for such loss to the extent that such person paid the compensation. An order of restitution shall require that all restitution to victims under such order be made before any restitution to any other person under such order is made.

REGULATIONS INVOLVED

28 C.F.R. § 2.20 (1991)

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> "Value of the property" refers to the estimated replacement cost to the victim.

STATEMENT OF THE CASE

This is an appeal from an order entered in the district court and affirmed by the Seventh Circuit dismissing Petitioner's appeal of a bankruptcy settlement order for lack of standing. Petitioner is a shareholder and former employee of DuPage Boiler Works, Inc. DuPage Boiler Works, Inc. is the debtor in this bankruptcy. The underlying bankruptcy court order was a May 3, 1989, order approving the settlement of certain fidelity bond claims (the "Settlement Order") in the Chapter 11 bankruptcy case of DuPage Boiler Works, Inc. in the United States Bankruptcy Court for the Northern District of Illinois. The settlement compromised competing claims between DuPage Boiler Works, Inc. (the "Debtor") and the DuPage Boiler Works Amended Profit Sharing Plan (the "Plan") for proceeds of certain fidelity bonds issued by Aetna Casualty and Surety Company of Illinois ("Aetna") under a Comprehensive Dishonesty, Disappearance and Destruction Policy (the "Policy"). Both the Debtor and the Plan were named as insureds under the Policy; and both filed proofs of loss against the Policy. The proofs of loss named Scherl and several other employees as dishonest employees and alleged losses in excess of $4,000,000 for the Debtor and $745,000 for the Plan.

The settlement worked out between Aetna, the Debtor, and the Plan which compromised the claims of the Debtor and the Plan was that Aetna would tender $210,000 which was the policy limit for the claims against Scherl and two other employees, with the Debtor receiving $70,000 and the Plan $140,000. This was the settlement which the bankruptcy court approved over the objections of Scherl and which lies at the heart of this appeal.

At the time the Settlement Order was entered Scherl was incarcerated at the Metropolitan Correctional Center, pending sentencing on criminal charges of conversion of profit sharing funds and mail and wire fraud in connection with the conversion. Scherl entered into a Plea Agreement with the United States Attorney (the "Plea Agreement"), and was sentenced to 16 years imprisonment. The Sentencing Order entered on May 17, 1990, further provided: "It is further ordered that the defendant make restitution in the amount of $741,000.00."

Scherl appealed the Settlement Order on the grounds that the arbitrary division of the Aetna policy proceeds between the Debtor and the Plan would impact Scherl's restitution obligations and prospects for parole. Scherl contended that if the $70,000 earmarked by the Settlement Order for the Debtor were instead paid to the Plan, the replacement cost to the Plan victims would be reduced by $70,000.

The district court dismissed Scherl's appeal without reaching the merits on two grounds: (1) the district court did not have jurisdiction to hear the appeal since the Settlement Order was not a final order; and (2) Scherl was not a "person aggrieved" and did not have appellate standing. Scherl invoked the Seventh Circuit's jurisdiction pursuant to 28 U.S.C. § 158(d) and 28 U.S.C. § 1291 to review "final decisions" of the district court. The Seventh Circuit affirmed on the grounds that Scherl lacked standing to appeal since he did not meet the "person aggrieved" test of standing in bankruptcy proceedings.

REASONS FOR GRANTING THE WRIT

I.

The decision below that Scherl does not have standing to appeal a bankruptcy court order because he does not have a pecuniary interest that is affected by the order nor a conceivable nexus to the bankruptcy litigation since he is neither a debtor nor a creditor raises important and unresolved problems.

The Seventh Circuit has held here that Scherl does not have standing to appeal the Settlement Order because it concluded that (1) the allocation of funds to the Plan will not reduce Scherl's restitution obligations and therefore cannot impact his prospects for parole; and (2) Scherl is neither a debtor nor a creditor and has no conceivable nexus to the bankruptcy litigation. In reaching its decision the Seventh Circuit applied the "person aggrieved" standard of appellate standing which has generally been construed to limit appellate standing in bankruptcy to persons with a financial stake in the bankruptcy court's order. *See e.g., Fondiller v. Robertson (In re Fondiller)*, 707 F.2d 441, 442 (9th Cir. 1983). This decision raises the significant question of how appellate standing in the bankruptcy context is to be determined.

Section 39(c) of the Bankruptcy Act of 1898 limited appellate standing to "persons aggrieved." 11 U.S.C. § 67(c) (1976) (Repealed 1978). Courts interpreted the "person aggrieved" standard as limiting standing to those whose pecuniary interests were affected by the bankruptcy court's actions. *In re Revco D.S., Inc.*, 898 F.2d 498, 499 (6th Cir. 1990). Even though Section 39(c) was repealed with adoption of the Bankruptcy Reform Act of 1978 (the "Bankruptcy Code"), and the Bankruptcy Code contains no express provision on who has standing to appeal, many courts have expressly adopted pre-Code law with respect

to appellate standing in bankruptcy as a means of controlling proceedings that often involve many creditors who are unhappy with compromises that can prevent them from receiving full payment. *See In re Carbide Cutoff*, 703 F.2d 259, 264 (7th Cir. 1983). The result is the requirement that appellants demonstrate that they are directly and adversely affected pecuniarily by the order of the bankruptcy court in order to have appellate standing under the Bankruptcy Code. *See e.g., International Trade Admin. v Rensselaer Polytechnic Inst.*, 936 F.2d 744, 747 (2d Cir. 1991); *Holmes v. Silver Wings Aviation*, 881 F.2d 939, 940 (10th Cir. 1989); *In re El San Juan Hotel*, 809 F.2d 151, 154-55 (1st Cir. 1987); *Fondiller*, 707 F.2d at 442.

Application of the pecuniary interest test has resulted in the exclusion of debtors, creditors, shareholders and other interested parties from being able to appeal a bankruptcy court order even though the Bankruptcy Code itself contains no such limitations. *See Carbide Cutoff*, 703 F.2d at 264. (The general rule that evolved from application of the pecuniary interest test is that only the trustee has standing to appeal from a bankruptcy court order affecting the size of the bankruptcy estate). Recognizing that the "person aggrieved" standard is too narrow, courts have fashioned exceptions on a case by case basis "when the purposes of restricting the standing requirements are not apposite." *Id. See e.g., Tringali v. Hathaway Mach. Co.*, 796 F.2d 553 (1st Cir. 1986) (Debtor had standing to appeal order which would result in distribution of insurance proceeds to tort plaintiffs even though debtor was not hurt by the order since the insurance proceeds could only be paid to tort plaintiffs. Rationale: Debtor's remaining estate could be affected by how, when, and to whom insurance proceeds were paid); *Carbide Cutoff*, 703 F.2d at 259 (Special counsel to the bankruptcy

trustee might have standing to appeal bankruptcy court order approving an application to compromise the estate's claims, and court remanded case for determination of scope of special counsel's authority). *See also*, *El San Juan Hotel*, 809 F.2d at 155, footnote 6 (There are two exceptions to the general rule that an insolvent debtor has no standing to appeal orders affecting the size of the estate: (1) if a successful appeal of the debtor would create an estate with assets greater than liabilities; and (2) an appeal from orders affecting the terms, conditions, and extent of the debtor's discharge).

These cases which deviated from the traditional "person aggrieved" standard relied on standing principles enunciated by the Court in the context of nonbankruptcy cases. *See Tringali*, 796 F.2d at 561 (Relying on *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 102 S. Ct. 752 (1982) and *Association of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 90 S. Ct. 827 (1970) for the principle that standing results from a potential injury in fact that is within the scope of the interests that the statute protects).

Moreover, recent decisions by several Circuits have recognized that the pecuniary interest test incompletely states the rule of appellate standing in bankruptcy. *See Revco*, 898 F.2d at 499; *In re Clark*, 927 F.2d 793 (4th Cir. 1991). These decisions involved the appellate standing of United States trustees who never have pecuniary interests in cases and could not meet the traditional "person aggrieved" standard as it has been defined by the courts.

The result of adherence to the "person aggrieved" standard is the potential exclusion of parties who have an interest in appealing bankruptcy court orders even though their interest may not be economic. Moreover, since courts

deviate from the standard where the results would not be "apposite," there can be unevenness in the application of the standard depending on how the merits of individual petitioners' cases strike the judges hearing the appeal. A further problem with the "person aggrieved" standard as applied by the Circuits is that it can exclude from standing those parties like Scherl to whom the Bankruptcy Code specifically gives standing.

Scherl is a shareholder of the Debtor. Section 1109(b) of the Bankruptcy Code provides that a party in interest, including a shareholder, "may raise and may appear and be heard on any issue in a case" under Chapter 11. *See* 11 U.S.C. § 1109(b) (1988). The Circuits have disagreed over the breadth of the standing conferred by § 1109(b) to debtors, creditors, shareholders, and indenture trustees. *See In re Marin Motor Oil*, 689 F.2d 445, 453 (3rd Cir. 1982), *cert. denied*, 459 U.S. 1206 and 459 U.S. 1207 (1983) (Giving § 1109(b) a broad and absolute reading to conclude that the creditors' committee had a right to intervene in an adversary proceeding instituted by the trustee). *But see, In re James Wilson Assoc.*, 965 F.2d 160, 169 (7th Cir. 1992) ("But we do not think that this section was intended to waive other limitations on standing . . . although a literal reading of section 1109(b) would support such an interpretation").

A literal reading of the language and the legislative history support the unqualified right to be heard by a party in interest including a shareholder. The legislative history states that § 1109

> [p]rovides, in unqualified terms, that any creditor, equity security holder, or an indenture trustee shall have the right to be heard as a party in interest under this chapter in person, by an attorney, or by

> a committee. It is derived from section 206 of chapter X (11 U.S.C. 606).

S. Rep. No. 95-989, 95th Cong., 2d Sess. 116, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5902. Case law under § 206 of Chapter X supports the absolute right to appear and be heard of debtors, creditors, shareholders, and indenture trustees. *Marin*, 689 F.2d at 451. It is clear from these comments that Congress intended § 1109(b) to give parties in interest like shareholders an absolute right to be heard on any issue in a Chapter 11 case, thereby allowing courts no discretion to deny intervention to such parties.

In light of the plain language of § 1109(b) and the legislative history, the Third Circuit's reading of § 1109(b) appears to be the correct one; and Scherl, as a shareholder, has standing to be heard regarding the Settlement. On the other hand, even if Scherl were required to meet other standing requirements pursuant to the Seventh Circuit's reading of § 1109(b), Scherl could demonstrate a potential but noneconomic injury in fact.

The Plea Agreement that Scherl entered into with the United States Attorney specified a loss to the victims of the Plan in the approximate amount of $741,000, thus recognizing the Plan as the victim of Scherl's fraud. The amount of this loss affects Scherl's prospects for parole under applicable parole guidelines.

28 C.F.R. § 2.20 which applies to Scherl since his illegal conduct was committed prior to November 1, 1987, sets forth specific parole guidelines which are dependent upon the "value of the property" of the victims. The term "value of the property" is defined as the "estimated replacement cost to the victim." 28 C.F.R. § 2.20, Ch. 3, Sub. Ch. B ¶ 20.

The magnitude of the net replacement costs to the Plan depends upon the allocation of the fidelity bond proceeds. If all $210,000 instead of $140,000 of the fidelity bond proceeds are paid to the Plan, there would be a reduction in the net replacement value of the property lost by $70,000. If a parole board interprets replacement value as net loss to the victims of Scherl's fraud, then the allocation of funds to the Debtor instead of the Plan has an impact on Scherl's parole rights. Thus, Scherl's liberty interests could be impaired and affected by the Settlement Order.

In the nonbankruptcy context this Court has recognized that standing may stem from noneconomic as well as economic injury. *See Data Processing*, 397 U.S. at 153, 90 S. Ct. at 830. In the nonbankruptcy context Scherl may well have been found to have standing to appeal since the Settlement Order has a potential impact on the likelihood of an earlier parole for Scherl. In the bankruptcy context Scherl should have standing to be heard on the Settlement Order pursuant to § 1109(b), even though he may not meet the financial interest test of the "person aggrieved" standard. This potential disparity in treatment highlights the importance of this Court addressing the issue of standing in the bankruptcy context.

II.

The Seventh Circuit erroneously applied the "person aggrieved standard" to determine that Scherl did not have standing to appeal the bankruptcy court order approving the settlement.

According to the Seventh Circuit the "person aggrieved" requirement of appellate standing in bankruptcy proceedings limits appeals to those persons whose property is

diminished, whose burdens are increased, or whose rights are impaired by the bankruptcy order. *In re DuPage Boiler Works*, 965 F.2d 296, 297 (7th Cir. 1992). In holding that Scherl did not meet this standard, the Seventh Circuit misread Scherl's sentencing order as requiring him to make restitution to Aetna.

The sentencing order entered by the District Court on May 17, 1991, (the "Sentencing Order"), convicted Scherl of "convert[ing] and caus[ing] to be converted to his own use Profit Sharing Funds . . ." and sentenced Scherl to sixteen (16) years of incarceration. *United States v. Scherl*, No. 86 CR 00721-01 (N.D. Ill. May 17, 1991). The court also ordered that "the defendant make restitution in the amount of $741,000." *Id.* Scherl's Plea Agreement entered into with the United States Attorney prior to sentencing specified that the loss to the victims of the DuPage Boiler Works Profit Sharing Fund fraud was $741,000, the exact amount of Scherl's restitution obligations. Unlike the Plea Agreement which distinguishes between the victims of the DuPage Boiler Works Profit Sharing Fund fraud and those parties against whom secondary recovery may be made, including Aetna, the Sentencing Order did not specify that Scherl was to make restitution to secondary victims of his wrongdoings, only that he was to make restitution in the amount of $741,000.

The payment of funds to the Debtor instead of to the Plan, which is the specified victim in Scherl's Plea Agreement, impacts Scherl's restitution obligations. If the $70,000 paid to the Debtor were paid to the Plan instead, Scherl's restitution obligations would be reduced by an additional $70,000. Since the Settlement Order provides for a $70,000 payment to the Debtor, Scherl's personal liability under the restitution obligations of the Sentencing Order is af-

fected, and Scherl is a "person aggrieved" who has standing to appeal the order.

The Seventh Circuit concluded that Aetna could be a victim to whom Scherl has restitution obligations pursuant to 18 U.S.C. § 3663(e)(1). While § 3663(e)(1) permits insurers who compensate victims to be entitled to restitution, this Court has said that victims have no independent enforceable right to receive restitution. *Kelly v. Robinson*, 479 U.S. 36, 52, 107 S. Ct. 353, 362 (1986). ("The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant"). The case relied upon by the Seventh Circuit, *United States v. Durham*, 755 F.2d 511 (6th Cir. 1985), to support its interpretation that the word "victim" in the Sentencing Order includes Aetna is distinguishable from Scherl's situation since the *Durham* restitution order specifically identified the insurer as a party to receive restitution.

Scherl's sentencing order does not specify restitution payments to be made to Aetna. Thus, the Seventh Circuit's decision is flawed in that Aetna's eligibility to receive restitution payments pursuant to § 3663(e)(1) does not create a restitution obligation absent court order. Without a court-ordered restitution obligation to Aetna, the allocation of fidelity bond proceeds between the Debtor and the Plan has an impact on Scherl's restitution obligations. This is sufficient to give him standing to appeal the Settlement Order under the "person aggrieved" test of standing.

CONCLUSION

For the foregoing reasons, the petitioner Morton Scherl respectfully requests that this Court grant this petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 91-1975

IN THE MATTER OF:
DUPAGE BOILER WORKS, INCORPORATED,
Debtor

APPEAL OF: MORTON SCHERL

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 89 C 9270—**William T. Hart**, *District Judge.*

ARGUED JANUARY 21, 1992—DECIDED JUNE 2, 1992

Before BAUER, *Chief Judge*, CUDAHY, *Circuit Judge*, and WOOD, JR., *Senior Circuit Judge.*

WOOD, JR., *Senior Circuit Judge.* Morton Scherl (a/k/a Robert Caldwell) used to work for DuPage Boiler Works, Incorporated ("DuPage"). DuPage is the debtor in this litigation. Scherl is presently incarcerated and serving a sixteen-year sentence for, among other offenses, participating in a scheme to defraud DuPage and the DuPage Boiler Works Amended Profit Sharing Plan ("the Plan"). Before DuPage filed a bankruptcy petition, Aetna Casualty and Surety Company of Illinois ("Aetna") issued its Comprehensive Dishonesty, Disappearance and Destruction Policy, Form B, numbered 08 BY 3833 BCI, effective September 26, 1983 ("the Bond"). The Bond lists both DuPage and the Plan as named insureds. The Bond pro-

vides coverage for loss of money, securities, and other property which the Bond's insureds shall sustain through any fraudulent or dishonest act or acts committed by any of the employees of DuPage or the Plan, acting alone or in collusion with others. The maximum recovery with respect to any single individual is $70,000.00, regardless of how many wrongful acts that individual may have committed.

DuPage filed with Aetna a Proof of Loss on the Bond dated February 19, 1988, naming Scherl and two other employees (William Goodstein and Marshall Adelman) as dishonest employees and alleging a total loss arising from dishonest acts of DuPage employees in excess of four million dollars. The Plan also filed with Aetna a Proof of Loss on the Bond dated February 16, 1988. The Plan's Proof of Loss also names Scherl as a dishonest employee (as well as Goodstein, Jack Eberwein and Adelman) and alleges a total loss of $747,590.00 arising from dishonest acts of employees.

After negotiations Aetna agreed to tender, without allocating between the two insureds, $210,000.00, which was the policy limit for the claims made with respect to Scherl, Goodstein and Eberwein. Trustees for DuPage and the Plan then agreed to divide the $210,000.00 with the Plan receiving $70,000.00 for Eberwein's conduct, and with DuPage and the Plan splitting equally $140,000.00 for claims concerning Scherl and Goodstein. Aetna reserved its rights with respect to claims arising out of Adelman's conduct, and the Trustees for DuPage and the Plan agreed to share equally any recovery ultimately achieved upon claims concerning Adelman. On November 21, 1988, the district court entered an order approving the settlement.

On May 3, 1989, a bankruptcy court order approving the settlement of certain fidelity bond claims ("Settlement Order") was entered over Scherl's objection. At that time, Scherl was incarcerated and awaiting trial on an indictment charging, among other offenses, conversion of profit sharing funds and mail and wire fraud in connection with the conversion. On May 21, 1990, Scherl was sentenced on

the following counts of the indictment to which he pleaded guilty: (i) Count 26, concerning conversion of profit sharing funds; (ii) Count 16, concerning mail fraud in connection with the withdrawal of profit sharing funds; (iii) Count 8, wire fraud in connection with the transfer and diversion of profit sharing funds; (iv) Count 32, escape; and (v) Count 37, income tax evasion. Scherl was sentenced to sixteen years' imprisonment and ordered to "make restitution in the amount of $741,000." On March 1, 1991, the district court dismissed Scherl's appeal of the Settlement Order for lack of standing. Scherl now comes to us contending that the Settlement Order impacts his prospects of parole and his restitution obligations. Like the district court, we conclude that Scherl does not have standing to appeal the order, and we affirm.

In order to appeal a bankruptcy court's order, a litigant must qualify as a "person aggrieved" by the order. *In re El San Juan Hotel*, 809 F.2d 151, 154 (1st Cir. 1987). A "person aggrieved" by a bankruptcy order must demonstrate that the order diminishes the person's property, increases the person's burdens, or impairs the person's rights. *See In re Fondiller*, 707 F.2d 441, 442 (9th Cir. 1983). The "person aggrieved" test insures that bankruptcy proceedings are not unreasonably delayed by protracted litigation by allowing only those persons whose interests are directly affected by a bankruptcy order to appeal. *See El San Juan Hotel*, 809 F.2d at 154.

We do not think that Scherl has demonstrated that he is a "person aggrieved" by the Settlement Order. Scherl maintains that the Settlement Order impacts the magnitude of his restitution obligation of $741,000.00. Scherl says that if the $70,000.00 paid by Aetna to DuPage had instead been applied to the Plan, his restitution obligation would have been reduced by $70,000.00. Scherl comes to this conclusion because he believes that his restitution obligation runs only to the Plan as the specified victim in his plea agreement. Scherl's position is erroneous.

First, Scherl's plea agreement states:

> restitution is due from the defendant and [ ] the loss to victims of the DuPage Boiler Works Profit Sharing fund fraud is approximately $741,000. . . . The defendant recognizes that pursuant to 18 U.S.C. § 3663(e)(1), he is subject to the imposition of that amount to the victims, or to those against whom secondary recovery has been made by the victims . . . .

It is obvious the plea agreement refers generally to the victims of Scherl's scheme, not just to the Plan. Accordingly, Scherl's restitution obligation of $741,000.00 does not change regardless of the allocation of funds that the Plan and DuPage received from Aetna.

Moreover, under 18 U.S.C. § 3663, Aetna can be considered a victim of Scherl's scheme. Section 3663(a) states: "The court . . . may order . . . that the defendant make restitution to any victim of the offense." Section 3663(e)(1) reads in pertinent part: "the court may in the interest of justice, order restitution to any person who has compensated the victim for its loss to the extent that such person paid the compensation." The Sentencing Order does not name Aetna specifically, but neither does it specifically name DuPage or the Plan. It simply refers to "victims," and it is not unreasonable to interpret this term to include Aetna. In *United States v. Durham*, 755 F.2d 511 (6th Cir. 1985), the court held the term "victim" to include an insurer of an automobile burned during a robbery. The *Durham* court looked to the legislative history behind 15 U.S.C. § 3579, now § 3663, and concluded that Congress intended the definition to reach indirect victims of a crime such as an insurer. *See Durham*, 755 F.2d at 513.

There is no persuasive argument supporting Scherl's assertion that he is aggrieved by the Settlement Order. Scherl is not a debtor. He is clearly not a creditor—he owes a great deal of money to the estate. Appellees note that his only conceivable nexus to the bankruptcy litiga-

tion is as a shareholder of the debtor corporation. Even that status does not presumptively give him standing to appeal the Settlement Order. *See Matter of Central Ice Cream Co.*, 836 F.2d 1068 (7th Cir. 1987) (trustee and corporation itself presumptively represent all interests in a bankrupt firm, preventing stockholders from litigating on their own). Finally, Scherl argues that his prospects for parole are in some way affected by the Settlement Order because the allocation of funds to the Plan will reduce the net amount lost by the victims of Scherl's scheme. We have already decided that the allocation of funds from Aetna between DuPage and the Plan does not affect Scherl's restitution obligations and therefore cannot impact his prospects for parole.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: June 2, 1992

BEFORE:

Honorable William J. Bauer, Chief Judge
Honorable Richard D. Cudahy, Circuit Judge
Honorable Harlington Wood, Jr., Senior Circuit Judge

No. 91-1975

IN THE MATTER OF:
DUPAGE BOILER WORKS, INCORPORATED,

Debtor

APPEAL OF: MORTON SCHERL

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 89 C 9270, Judge William T. Hart

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that the judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered this date.

(1061-030690)

[Dated February 1, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 89 C 9270

IN RE:	)	
	)	
DUPAGE BOILER WORKS, INC.,	)	Appeal from the United States Bankruptcy Court for the Northern District of Illinois
	)	
Debtor	)	Case No. 86 B 16250
	)	
	)	Jack B. Schmetterer, Bankruptcy Judge

MEMORANDUM OPINION AND ORDER

This is an appeal from the bankruptcy court's order approving settlement of a fidelity bond claim of the trustee. The settlement was between the trustee, an entity related to the debtor that also made a claim on the bond, and the insurance company that issued the bond. One of the employees whose fidelity was insured brought this appeal challenging the bankruptcy court's approval of the settlement. Prior to completing briefing on the appeal, questions of the finality of the order appealed from and the appellant's standing were raised. Since the order appealed from was not a final and appealable order this appeal is dismissed for lack of jurisdiction.

In the party's presentation to this court, the underlying facts have not been well developed. The facts, as pre-

sented, are as follows. In 1983, debtor DuPage Boiler Works, Inc. ("DuPage") and DuPage Boiler Works Amended Profit Sharing Plan (the "Plan") purchased a Comprehensive Dishonesty, Disappearance and Destruction Policy from Aetna Casualty and Surety Company of Illinois. Both DuPage and the Plan are named as insureds under the policy and the policy covered losses due to dishonest acts of the employees of both insureds. The policy, however, purportedly limited coverage to $70,000 per any one employee. In 1986, DuPage went into bankruptcy under Chapter 11. In 1988, the trustee of the debtor estate filed a $4,000,000 claim with Aetna alleging losses due to dishonest acts of Morton Scherl, William Goodstein, and Marshall Adelman. The Plan filed a $747,590 claim with Aetna based on the dishonest acts of Scherl, Goodstein, Adelman, and Jack Eberwein.[1]

The two claimants and Aetna subsequently reached a settlement as to claims related to Scherl, Goodstein, and Eberwein. Aetna agreed to pay $210,000 ($70,000 per employee). The Plan was to receive $70,000 related to Eberwein since DuPage had made no claim related to him. The Plan and DuPage were to even divide the $140,000 related to Scherl and Goodstein. Thus, the Plan was to receive $140,000 of the settlement and DuPage was to receive $70,000 of the settlement. The Plan and DuPage also agreed to evenly split any amount that might be recovered from Adelman.[2] The claim related to Adelman was

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[1] The Bankruptcy Court's order approving the settlement refers to the policy, the two insureds' claims, and the parties Settlement agreement being attached to the order. While the Bankruptcy Court's order is in the record before this court, none of the other items are attached to it nor otherwise included in the record.

[2] It is unclear if they agreed to split any amount recovered from Aetna or if they also agreed to split any amount recovered directly from Adelman.

still pending in the bankruptcy court. The trustee moved the Bankruptcy Court to approve the settlement. Scherl, who was then incarcerated at the Metropolitan Correctional Center awaiting sentencing on a guilty plea, filed objections to the settlement. The Bankruptcy Court approved the settlement on May 3, 1989. Scherl timely filed his notice of appeal on May 9, 1989.

The first question is whether there was a final order to appeal from. It is true, as appellant contends, that approval of a settlement can be a final order. *See In re Patel*, 43 Bankr. 500, 503 (N.D. Ill. 1984). Appellant, however, does not address the question of whether partial settlement of a claim can be a final order. In *Patel*, the trustee settled with one of the defendants to a claim. The court found there was a final appealable order as to the settlement with that defendant. In that case, though, it appeared that there was a distinct claim as to the settling defendant. In any event, the present case is distinguishable. Here, it is only alleged that there was a single claim against one defendant, Aetna, for $4,000,000. Although that claim was based on the wrongdoing of four different employees, there is no indication that there was a distinct claim based on the wrongdoing of each employee. Also, the claim was only against one entity, the insurer, not against each employee. The entire claim against the insurer was not settled, only the claim as it related to three of the four employees.

While it is true that there is a "somewhat relaxed sense of finality . . . traditionally characterizing bankruptcy," *In re Jartran, Inc.*, 886 F.2d 859, 861 (7th Cir. 1989) (quoting *In re J. Catton Farms Inc.*, 779 F.2d 1242, 1250 (7th Cir. 1985)) (ellipsis in *Jartran*), there generally still must be a resolution of "a discrete judicial unit" of the bankruptcy proceeding. *In re Moody*, 825 F.2d 81, 85 (5th Cir. 1987).

While the claim of the trustee as against Aetna can be viewed as one such judicial unit, there is nothing presented to indicate that, for purposes of finality, that claim can be broken down into four distinct units. *Cf. id.*; *Jartran*, 886 F.2d at 862-63. There is nothing presented to indicate that the four employees committed four separate and distinct acts of dishonesty that resulted in losses to DuPage. Since the only indication is that they caused a joint loss of $4,000,000, it would appear that any portion of the $4,000,000 claim related to a particular employee cannot be considered a distinct and separately appealable claim. Thus, there was no final order from which to appeal.

Under 28 U.S.C. § 158(a), this court can grant leave to take an interlocutory appeal. Such leave can be granted even if not expressly requested in the notice of appeal and certification by the Bankruptcy Court is not required. *Jartran*, 886 F.2d at 865-66. Appellant has inserted the following footnote into its brief before this court: "Even if the court determines that the Settlement Order is not final, this Court may treat the Notice of Appeal as a Motion For Leave to Appeal and grant leave to appeal. *See* Bankruptcy Rule 8003(c); *In re Huff*, 61 Bankr. 678, 682 (N.D.Ill. 1986). Thus, even if the Settlement Order is not final, this Court may still have jurisdiction to hear the appeal." This is not an adequate argument, but perhaps the present appeal raises a sufficiently important question to justify granting leave to appeal. *Cf. Jartran* 866 F.2d at 865. Before determining that issue, however, it will first be determined whether Scherl has any standing to appeal.

Appellant concedes that he must be a "person aggrieved" in order to have standing to take this appeal. *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 642 (1st Cir. 1988). Appellant claims he is a person aggrieved because the plea agreement in the criminal case against him calls for resti-

tution of up to $741,000 for the victims of his acts or for those against whom secondary recovery has been made by the victims.[3] He argues that the settlement with Aetna imposes additional restitution obligations upon him. There is, however, no increase in any obligation on his part. If Scherl owed restitution to DuPage and Aetna covers part of that obligation, Aetna would become a secondary victim to whom Scherl also owes restitution. However, for each dollar Scherl may become obliged to pay Aetna, it is also one dollar less that he would owe directly to DuPage. Appellant does not point to any circumstance under which his overall obligation would be either increased or decreased by the settlement between Aetna and DuPage. Since Scherl has not shown that he has been aggrieved, he lacks standing to take the present appeal.

Since the appellant lacks standing, there is no good reason to grant leave to appeal. This appeal, therefore, is dismissed for lack of appellate jurisdiction. To the extent there was otherwise a final appealable order over which this court has jurisdiction, the appeal is dismissed because the appellant lacks standing.

IT IS THEREFORE ORDERED that the Clerk of the Court is directed to enter judgment dismissing this appeal for lack of jurisdiction.

ENTER:

_____

UNITED STATES DISTRICT JUDGE

Dated: FEBRUARY 1, 1991

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[3] Subsequent to the briefing in the present appeal, Scherl was sentenced to 16 years' incarceration and restitution in the amount of $741,000. *See United States v. Scherl*, No. 86 CR 721-1 (N.D. Ill. May 17, 1990). A subsequent appeal was recently dismissed. *See United States v. Scherl*, 923 F.2d 67 (7th Cir. 1991).

[Dated May 3, 1989]

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE;	)	IN PROCEEDINGS UNDER CHAPTER 11
	)	
	)	
DUPAGE BOILER WORKS, INC.,	)	No. 86 B 16250
	)	
	)	
Debtor.	)	Hon. Jack B. Schmetterer

ORDER

This matter coming on to be heard upon the Trustee's Motion for Approval of Settlement of Fidelity Bond Claims, and upon the Motion for Restraint and Objection of Settlement of Fidelity Bond Claims and Complaint and memorandum in support filed by Morton Scherl, due and proper notice having been given, and the Court having reviewed the pleadings filed in this matter, and having heard the statements of counsel, and being otherwise fully advised in the premises;

THE COURT FINDS;

1. Prior to the filing of the petition herein, Aetna Casualty and Surety Company of Illinois ("Aetna") issued its Comprehensive Dishonesty, Disappearance and Destruction Policy, Form B, numbered 08 BY 3833 BCI, effective as of September 26, 1983 (the "Bond"). A copy of the Bond is attached hereto as Exhibit A. The Bond lists both DuPage Boiler Works, Inc. ("DuPage") and the DuPage Boiler Works Amended Profit Sharing Plan (the

"Plan") as named insureds. Under the Bond, coverage is provided for loss of money, securities, and other property which its insureds shall sustain through any fraudulent or dishonest act or acts committed by any of the employees of DuPage or the Plan, acting alone or in collusion with others. However, the maximum recovery under the Bond with respect to any single individual is $70,000.00, regardless of how many wrongful acts that individual may have committed.

2. DuPage filed with Aetna a Proof of Loss on the Bond, a copy of which is attached hereto as Exhibit B, dated February 19, 1988, naming Morton Scherl (a/k/a Robert Caldwell), William Goodstein, and Marshall Adelman as dishonest employees and alleging a total loss in that Proof of Loss and subsequent documents, arising from their dishonest act or acts, in excess of $4,000,000.00.

3. The Plan filed with Aetna a Proof of Loss against the Bond, a copy of which is attached hereto as Exhibit C, dated February 16, 1988, naming Morton Scherl (a/k/a Robert Caldwell), William Goodstein, Jack Eberwein, and Marshall Adelman as dishonest employees and alleging a total loss in that Proof of Loss arising from their dishonest act or acts in the amount of $747,590.03.

4. The trustee of this estate (the "Trustee"), the trustee of the Plan (the "Plan Trustee"), and Aetna have agreed, subject to the approval of this Court, to a settlement, whereby Aetna would make full payment in the amount of $70,000.00 each for the claims with respect to Scherl, Goodstein, and Eberwein, for a total agreed payment of $210,000.00. Aetna has reserved its rights with respect to the claims concerning Marshall Adelman pending presentation of additional evidence. The Trustee and the Plan Trustee have agreed to a division of the $210,000.00

as follows: The Plan will receive the entire $70,000.00 payment for the claim concerning Eberwein, inasmuch as the Trustee made no claim with respect to Eberwein. The Plan and DuPage will divide in half the $140,000.00 payment for the claims made by each of them with respect to Scherl and Goodstein. The Trustee and the Plan Trustee have also agreed to share equally any recovery ultimately achieved from the claims made by each of them with respect to Adelman. A copy of the Settlement Agreement is attached hereto as Exhibit D.

THE COURT CONCLUDES AND FURTHER FINDS:

1. The proposed settlement is in the best interest of the estate. The Court has considered the following standards prescribed by the United States Supreme Court in *Protective Committee for Independent Stockholders, etc. v. Anderson*, 390 U.S. 414, 88 S. Ct. 1649, 20 L.Ed.2d 425 (1968): (a) the probabilities of ultimate success in the litigation; (b) the complexity, expenses, and likely duration necessarily attending it; (c) the possible difficulties of collecting on any judgment ultimately upheld; and (d) other factors relevant to a full and fair assessment of the proposed compromise. The Settlement Agreement provides a pragmatic, realistic, and fair resolution of entitlement to the funds payable under the Bond and avoids expensive litigation over such entitlement as between the two named insureds, viz., DuPage and the Plan.

2. The Court has considered the objections raised by Mr. Scherl. Mr. Scherl objects, essentially, to being stigmatized by the allegations that he committed a fraud. However, this Order in no way stands as an adjudication of any allegations concerning Mr. Scherl. Any finding of wrongdoing by Mr. Scherl will have to be made, if at all, by another court without any regard to this matter.

Moreover, Mr. Scherl is not affected monetarily by the Settlement Agreement or this Court's approval thereof. Indeed, this Court concludes, for the reasons set forth above, that the Settlement Agreement is in the best interests not only of the estate but also of its stockholders.

IT IS THEREFORE ORDERED that the Trustee's Motion for Approval of Settlement of Fidelity Bond Claims be, and the same is hereby allowed, the objections thereto filed by Morton Scherl are overruled, and the Settlement Agreement is approved.

IT IS FURTHER ORDERED that Aetna Casualty and Surety Company of Illinois is authorized and directed to make payment of the sum of $210,000.00 as provided in the Settlement Agreement.

Dated at Chicago, Illinois, this 3rd day of May.

E N T E R:

_____

OPPOSITION

BRIEF

Supreme Court U.S.
FILED
SEP 30 1992
OFFICE OF THE CLERK

No. 92-395

In The

Supreme Court of the United States

October Term, 1992

MORTON SCHERL,

Petitioner,

v.

LAWRENCE FISHER, as Trustee and STEWART KARGE, as Trustee,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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No. 92-395

In The

Supreme Court of the United States

October Term, 1992

MORTON SCHERL,

Petitioner,

v.

LAWRENCE FISHER, as Trustee and STEWART KARGE, as Trustee,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Morton Scherl, the Petitioner in this case ("Scherl" or "Petitioner"), has requested a writ of certiorari to appeal an order of the Seventh Circuit Court of Appeals which affirmed a District Court Order holding that the Petitioner lacked standing to challenge an agreement between two named insureds as to the distribution of the proceeds of a fidelity bond. The two named insureds were Lawrence Fisher, as trustee of the bankruptcy estate of DuPage Boiler Works, Inc., and Stewart Karge, as trustee of the DuPage Boiler Works Amended Profit Sharing Plan. The

agreement for distribution was presented to and approved by the Bankruptcy Court. Petitioner, who is neither the debtor nor a creditor in the bankruptcy case, is a convicted felon whose criminal activities helped to precipitate the debtor's Chapter 11 case.

It was the fraud of Petitioner, his attorney, and two other employees of DuPage Boiler Works, Inc. that gave rise to the insurance proceeds now in question, and both the bankruptcy estate and the profit-sharing plan were victims of that fraud. Petitioner now seeks this Court's authority to challenge, in a bankruptcy case he largely created, an agreement among parties he has grievously wronged.

The Respondents respectfully submit that the Petitioner is unaffected by the proposed settlement and that he has no standing to be heard on these matters.

Prior to DuPage Boiler Works, Inc. (the "Debtor") filing its petition under Chapter 11 of the Bankruptcy Code, Aetna Casualty and Surety Company of Illinois ("Aetna") had issued a "Comprehensive Dishonesty, Disappearance and Destruction Policy, Form B," number 08 BY 3833 BCI, effective as of September 26, 1983 (the "Bond"). The Bond listed both the Debtor and the DuPage Boiler Works Amended Profit Sharing Plan (the "Plan") as named insureds. Under the Bond, coverage was provided for loss of money, securities, and other property which the insureds sustained through any fraudulent or dishonest act or acts committed by any of the employees of the Debtor or the Plan, acting alone or in collusion with others. The maximum recovery under the Bond with respect to any single individual was $70,000.00, regardless of how many wrongful acts that individual may have committed.

Debtor filed with Aetna a Proof of Loss (the "Proof") on the

Bond dated February 19, 1988, naming the Petitioner Morton Scherl (who was also known from time to time as one "Robert Caldwell"), William Goodstein, and Marshall Adelman as dishonest employees. The Proof and subsequent documents alleged a total loss arising from the dishonest act or acts of Scherl, Goodstein and Adelman exceeding $4,000,000.00.

The Plan also filed a Proof of Loss (the "Plan's Proof") with Aetna which was dated February 16, 1988 and which named Scherl, Goodstein, Jack Eberwein, and Adelman as dishonest employees. The Plan's Proof alleged a total loss arising from the dishonest act or acts of $747,590.01.

After the Debtor's bankruptcy case commenced, negotiations among Aetna, the Trustee, and Stewart Karge [trustee of the Plan appointed by the United States District Court in Case No. 87 C 4699 (the "Plan Trustee")] led to a settlement agreement (the "Settlement Agreement") under which Aetna agreed to tender, without allocation between the two insureds, the sum of $210,000.00, which was the policy limit for the claims made with respect to Scherl, Goodstein, and Eberwein. The Trustee and the Plan Trustee then agreed to a division of the $210,000.00, under which (i) the Plan was to receive the entire $70,000.00 for the claim concerning Eberwein (as to whose conduct only the Plan had made a claim), and (ii) the Plan and the Debtor were to split equally the remaining $140,000.00 payment attributable to the claims concerning Scherl and Goodstein. Aetna reserved its rights with respect to the claims arising out of Adelman's conduct; the Trustee and the Plan Trustee agreed to share equally in any recovery from Aetna on the Adelman claim.[1]

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1. Aetna ultimately paid the sum of $46,350.00 in satisfaction of both the Plan's and the Trustee's claims with respect to Adelman. This sum was divided equally pursuant to the settlement.

Pursuant to the terms of this Settlement Agreement, the Plan Trustee made application to the United States District Court for the Northern District of Illinois, Eastern Division,. in Case No. 87 C 4699, styled "*Ann McLaughlin v. Robert Caldwell, et al.*," (the "District Court Action") for approval of the proposed Settlement. The District Court Action had been brought by the Attorney General of the State of Illinois for the appointment of a successor to Scherl as trustee of the Plan as well as for court-supervised administration of the Plan. At the time the District Court Action was initiated, Scherl was a fugitive from justice.

On November 21, 1988, the United States District Court entered an Order approving the Settlement among Aetna, the Trustee, and the Plan Trustee. At the time of the entry of this Order, Scherl had been apprehended, was being incarcerated at the Metropolitan Correctional Center in Chicago, Illinois, and was awaiting trial in a criminal case, described below.

On May 3, 1989, subsequent to approval of the Settlement by the District Court, the Bankruptcy Court, upon notice and hearing and over the objection of Scherl, entered the order appealed from herein (the "Settlement Order") approving the Settlement among Aetna, the Trustee, and the Plan Trustee. At the time of the entry of the Settlement Order, Scherl was still incarcerated and awaiting trial in his criminal case. In his criminal case [No. 86 CR 721 in the United States District Court for the Northern District of Illinois (the "Criminal Case")], Scherl had been indicted for, *inter alia*, violations of 18 U.S.C. § 644, (relating to conversion of profit sharing funds) and 18 U.S.C. § 1341 and 1343 (relating to mail and wire fraud, also in connection with the alleged § 644 conversion).

On or about June 20, 1989, Scherl pled guilty to the following counts of his Indictment: (i) Count 26, concerning conversion of profit sharing funds; (ii) Count 16, concerning mail fraud in connection with the withdrawal of profit sharing funds; (iii) Count

8, wire fraud in connection with the transfer and diversion of profit sharing funds; (iv) Count 32, escape; and (v) Count 37, income tax evasion. *See* Judgment entered May 17, 1990 in the Criminal Case (the "Sentencing Order").

On May 17, 1990, Scherl was sentenced to sixteen years imprisonment and ordered to "make restitution in the amount of $741,000." *Id.*

REASONS FOR DENYING THE WRIT

I.

THE DISTRICT COURT AND THE SEVENTH CIRCUIT COURT OF APPEALS APPLIED THE CORRECT STANDARD IN DENYING SCHERL'S APPEAL.

In order to appeal a bankruptcy court's order, a party must be a "person aggrieved" by such order. *In re El San Juan Hotel,* 809 F.2d 151, 154 (1st Cir. 1987). A litigant qualifies as a "person aggrieved" if the order diminishes his property, increases his burdens, or impairs his rights. *In re Fondiller*, 707 F.2d 441, 442-43 (9th Cir. 1983).

As the *In re El San Juan Hotel* case indicates, the overwhelming weight of authority indicates that a party has standing to appeal a bankruptcy court Order only if the putative appellant is a "person aggrieved." Petitioner erroneously asserts two lines of attack on this standard.

First, Petitioner asserts that *Tringali v. Hathaway Machine, Co.*, 796 F.2d 553 (1st Cir. 1986) and similar cases have created an exception of sorts to the "person aggrieved" standard. On the contrary, these cases are examples of the application of the "person

aggrieved" standard and demonstrate, in fact, the justification behind the standard. *Tringali*, for example, involved a creditor challenging a Chapter 11 debtor's ability to appeal an order affecting the proceeds from the debtor's insurance policies. The proceeds were clearly "property of the estate" under 11 U.S.C. § 541 and the debtor clearly had an interest in how such proceeds would be applied. Accordingly, the First Circuit ruled that the debtor's right to reorganize its assets — an activity that lies at the very heart of a Chapter 11 case — gave the debtor standing to appeal. Scherl, in contrast, is not asserting any right related to the Debtor's Chapter 11 reorganization; rather, he is attempting to dictate the disposition of other persons' assets to improve his position in his criminal proceedings.

Second, Scherl mistakenly relies on 11 U.S.C. § 1109 as support for his position. Scherl apparently forgets that he has already exercised his § 1109 right to be heard. He objected to the Settlement in the Bankruptcy Court and his objection was overruled. Section 1109 grants nothing more than that. The section clearly does not refer to appellant standing, and the very existence of § 1109 indicates that, in the section's absence, parties such as Scherl might not have standing in the first place before the Bankruptcy Court. Instead of arguing that Section 1109 threw open the doors of the appellate courts, tortfeasors should be thankful Congress gave them right to be heard at all in these cases.

II.

THE DISTRICT COURT AND THE SEVENTH CIRCUIT COURT OF APPEALS CORRECTLY APPLIED THE "PERSON AGGRIEVED" STANDARD.

A. The Settlement Order does not effect the magnitude of Scherl's restitution obligation.

The sentencing order provided in relevant part as follows: "It is further ordered that the defendant make restitution in the amount of $741,000." According to Scherl, he is a "person aggrieved" by the Settlement Order, because this restitution obligation would have been reduced by $70,000 if the moneys paid by Aetna to the Debtor had instead been paid to the Plan.

Scherl's position is without merit because Scherl's restitution obligation runs in favor of Aetna as well as the Plan. Because Scherl's obligation includes Aetna, it remains constant regardless of the amount paid by Aetna to the Plan. For example, under the Settlement Order, Aetna paid $140,000 to the Plan and $70,000 to the Debtor. Since the restitution obligation includes Aetna, Scherl still owes $741,000 — $601,000 to the Plan and $140,000 to Aetna. If, as urged by Scherl, the entire settlement sum of $210,000 were paid to the Plan, and nothing to the Debtor, he would still owe $741,000 — $531,000 to the Plan and $210,000 to Aetna. Under any circumstnces involving payments by Aetna to the Debtor, the aggregate restitution obligation does not change; if Scherl's obligation to the Plan is reduced, his obligation to Aetna is increased *pro tanto*. Accordingly, Scherl is not a "person aggrieved" by the Settlement Order.

Scherl argues, however, that his restitution obligation does not run to Aetna. He reasons that the sole "victim" of his DuPage Boiler Works Profit Sharing Fund fraud is the Plan and that there is no specific order to pay Aetna. According to Scherl, the Plan is "the specified victim in Scherl's Plea Agreement." The Plea

Agreement, however, does not so specify but merely refers generally to "victims of the DuPage Boiler Works Profit Sharing Fund fraud."

At the time of sentencing in May 1990, the Plan had already been paid $140,000 by Aetna. Clearly, the sentencing judge contemplated that Aetna would be a recipient of restitution payments, or he would have ordered restitution in the amount of $601,000 instead of $741,000.

More importantly, it is clear from case law that Aetna is very much a "victim" within the meaning of 18 U.S.C. § 3663, which provides, *inter alia*, that the "court . . . may order, in addition to . . . any other penalty authorized by law, that the defendant make restitution to any victim . . ." of an offense under Title 18 of the United States Code. In *United States v. Durham*, 755 F.2d 511, 513-514 (6th Cir. 1985), an insurer was held to be the "victim" of an offense within the meaning of this provision. The defendant had pled guilty to a charge of bank robbery, and the trial judge not only imposed a prison sentence but also ordered the defendant to pay restitution to the insurer of an automobile that defendant burned during the course of his getaway. In holding that the insurer was a"victim" within the meaning of the restitution provisions quoted above, the *Durham* Court stated:

> . . . We believe that Congress intended "victim" to be interpreted very broadly. Section 3579(a)(1) [now § 3663(a)(1)] permits restitution to "*any* victim of the offense." (emphasis added). The expansive definition suggested by this language is supported by other provisions of the Act that make clear that Congress intended the definition to reach "indirect" victims such as

> [the insurer] as well as "direct" victims, such as [the bank.]

Id. at 513. Further, in dismissing the defendant's contention that non-human entities are categorically excluded from the definition of "victim," the *Durham* Court observed that the Senate Report accompanying the legislation stated that one purpose of the victim and witness Protection Act was to remedy undesirable situations in which insurers and the insurance-buying public were being required to pay off offenders' debts. *Id. See also United States v. Florence*, 741 F.2d 1066, 1069 (8th Cir. 1984) (trial court did not abuse its discretion in ordering defendant to make full restitution, both to the bank he robbed and to its insurer).

Similarly, in *United States v. Sunrhodes*, 831 F.2d 1537 (10th Cir. 1987), the defendant pled guilty to assault on an Indian in Indian country, in violation of 18 U.S.C. §§ 113(c) and 1153. She was ordered to make restitution to the Indian Health Services Division of the Department of Health and Human Services ("IHS"), the entity that had paid the medical practitioners providing service to the individual she had assaulted. *Id.* The court held that IHS was a "victim" entitled to restitution under the Victim and Witness Protection Act. *Id.* at 1545.

Aetna, like the insurer in *Durham* and the Indian Health Services in *Sunrhodes*, is a victim of Scherl's offense. Accordingly, the restitution obligation fixed by the court at $741,000 runs to Aetna as well as to the Plan. As a result, amounts paid by Aetna to the Plan do not have the effect of reducing Scherl's restitution obligation; all such amounts are merely owed to Aetna rather than to the Plan. Scherl is therefore not aggrieved by allocation of payments to the Trustee under the Settlement Order; the allocation of payments under the Settlement Order, in fact, should be a matter of indifference to Scherl. His obligation was established by his own agreement, and his intrusion into the distribution of the

already inadequate available insurance proceeds among the parties he has injured is none of his concern.

Moreover, the difficulty with Scherl's argument in this respect can be seen in a simple hypothetical. Suppose the Trustee and the Plan Trustee had reached a much more advantageous settlement with Aetna — for example, a contribution of $4,000,000 to the Debtor and the Plan. Under Scherl's interpretation of his restitution obligations, Scherl would have been required to pay nothing, since his "victims" would have already been compensated. The result of this interpretation would be to (i) ignore the clear intention of Congress and the clear import of *United States v. Durham* and *United States v. Sunrhodes*; (ii) encourage nascent Scherls to find insured firms on which to work their frauds; and (iii) discourage insurers such as Aetna from writing defalcation policies or from settling defalcation cases.

B. Scherl would have no standing even if the restitution obligation had somehow been affected by the Settlement Order.

Scherl is not a "person aggrieved." As explained by the court in *El San Juan Hotel*, supra, the "person aggrieved" standing requirement

> . . . is necessary to insure that bankruptcy proceedings are not unreasonably delayed by protracted litigation that does not serve the interests of either the bankrupt's estate or its creditors. The nature of bankrupcy litigation, with its myriad of parties, directly or indirectly involved or affected by each order and decision of the bankruptcy court, mandates that the right of appellate review be limited to those persons whose interests are directly affected.

Id. at 154. Litigation which does not serve the interests of the estate or its creditors and which only touches upon the rights of third parties unrelated to the bankruptcy case does not qualify for review under this standing requirement at the instance of third parties who are at best, only vaguely related to the bankruptcy case.

For example, *In re Fondiller*, 707 F.2d at 442-43 (9th Cir. 1983), the court appointed a creditor's attorney as special counsel to prosecute litigation to recover assets that the debtor and his wife had allegedly concealed or fraudulently conveyed. The wife appealed the order of appointment, and the appellate court dismissed the appeal, holding that she lacked standing:

> [A]ppellant's only demonstrable interest in the order is as a potential party defendant in an adversary proceeding. As such, she is not a "person aggrieved" by [the attorney's] appointment.

Id.

Scherl cites a number of cases to support the proposition that he is aggrieved because the Settlement Order has a detrimental effect on his restitution obligation. In each of the cases cited, the appellant was the debtor, and the basic issues involved were bankruptcy-related. The distinction is obvious: Not only is Scherl not a debtor, he is not a creditor and in fact *owes* substantial sums to this estate. His only conceivable nexus to this case is as a shareholder of the debtor corporation. However, a shareholder of a debtor corporation is not a person aggrieved and has no standing to appeal an order of the bankruptcy court approving a settlement negotiated by a trustee in bankruptcy. The decision whether to appeal belongs to the trustee. *In re Central Ice Cream Co.*, 62. B.R. 357, 359-360 (N.D. Ill. 1986).

Scherl is a third party, convicted felon whose only concern in this matter is to upset a settlement that, in his view, brings too much money into the bankruptcy estate. He would have the estate and the distribution to creditors diminished by the diversion of monies to the Plan and its participants to serve what he perceives as his own pecuniary interests. Moreover, even if Scherl were to prevail in this appeal, the Plan participants' interests would not necessarily be served. The settlement would have to be reviewed and perhaps even reheard, depending upon the district court's disposition. At best, additional legal expense — perhaps substantial additional legal expense — would be incurred by the Plan in pursuing the litigation. At worst, the Settlement would be rendered nullity and, after a rehearing on the merits, the participants could receive *none* of the Aetna proceeds. It should be noted that the Plan Trustee negotiated the Settlement and recommended it for approval in the District Court Action. None of the participants — *i.e.* none of the parties with genuine pecuniary interests in this matter — objected to the Settlement, and the district court entered an order approving it.

In short, Scherl is a mischief-maker in this proceeding, pursuing his own interests at the risk of victimizing every party with a legitimate interest in the Settlement proceeds.

C. The Settlement Order does not impair Scherl's parole prospects.

In a last, unfortunate attempt to establish himself as an aggrieved person, Scherl links the Settlement Order to his distant prospects for parole. He claims that because the parole officer must consider, in assessing the advisability of parole, the value of the property lost by the victims of his offense, any reduction in the restitution obligation will increase his prospects for parole. This is merely wishful thinking on Scherl's part. Even if his restitution obligation were reduced by payments from Aetna to the Plan, the

magnitude of Scherl's crime remains unchanged. it is inconceivable that a parole officer, assessing the advisability of returning Scherl to society, would be influenced by the fact that Aetna had paid the proceeds of Scherl's fidelity bond to the participants in the Plan. Again, the gravamen of Scherl's argument is that putative parolees should receive special — favorable — consideration because they thieved from insured victims (and, hence, from their insurers) rather than from uninsured victims.

Scherl's reading of the parole regulations would render an entire section of the relevant regulation a nullity. Under 28 C.F.R. § 331(g), part of the "U.S. Parole Commision's Offense Behavior Severity Index," "value" of property is considered for attempted crimes, not just actual crimes. Obviously, the actual pecuniary loss to the victim of an attempted crime is zero, so inclusion of a valuation formula for victims of attempted crimes would be meaningless if it did not refer to the value of property subject to the attempted crime. At issue for these purposes is not the net loss to the victim, but the gross value of the attempted crime by the perpetrator. Here, the gross value of the crime — and Scherl's parole chances — remains the same no matter how insurance proceeds are divided.

CONCLUSION

For all the foregoing reasons, this Court should deny the writ sought by Petitioners.

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